

## II

- (Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 19 December 1990

relating to a proceeding under Article 85 of the EEC Treaty

IV/33.133-A: Soda-ash — Solvay, ICI

(Only the French and English texts are authentic)

(91/297/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

## PART I

## THE FACTS

Having regard to the Treaty establishing the European Economic Community,

## A. Summary of the infringement

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup>, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 15 thereof,

Having regard to the Commission Decision of 19 February 1990 to open a proceeding on its own initiative pursuant to Article 3 of Regulation No 17,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 <sup>(2)</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions.

- (1) 1. The present Decision arises out of investigations carried out by the Commission in March 1989 pursuant to Article 14 (3) of Regulation No 17 at the premises of Community producers of soda-ash. By means of the said investigations and subsequent enquiries under Article 11 of Regulation No 17 the Commission discovered documentary evidence showing that an infringement of Article 85 of the EEC Treaty had been committed by the following undertakings:
- Solvey et Cie, Brussels (Solvay),
  - Imperial Chemical Industries plc, London (ICI).
2. The infringement can be summarized as follows:

*Infringement of Article 85 by Solvay and ICI*

- (2) From at least 1 January 1973 Solvay and ICI, the two major producers of soda-ash in the Community, participated in a concerted practice contrary to

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No 127, 20. 8. 1963, p. 2268/63.

Article 85 of the EEC Treaty by knowingly continuing in concert and complicity to observe and apply the essential terms of 'Page 1000', a restrictive market-sharing agreement dating from 1945 or earlier and which they had purported to terminate in 1972, by coordinating their respective commercial activities, by avoiding all competition with each other and by confining their soda-ash activities in the Community to their traditional home markets namely continental western Europe for Solvay and the United Kingdom for ICI.

## B. The soda-ash market

### 1. The product

- (3) The present procedure concerns soda-ash (sodium carbonate), an alkaline chemical commodity which is mainly used as a raw material in the manufacture of glass. Soda-ash is the primary source of sodium oxide which acts as a flux in the glass-melting process. Soda-ash is also used in the chemical industry for making detergents and in metallurgy.
- (4) In Europe, soda-ash is manufactured from common salt and limestone by the 'ammonia-soda' process invented by Solvay in 1865. The Solvay process initially produces light ash which requires a further stage of densification to produce the dense form. The two forms are chemically identical but dense ash is the preferred form for glass manufacture.
- (5) In the United States, so-called 'natural' soda-ash is mined from trona ore deposits found mainly in Wyoming. After mining, the trona ore is purified and calcinated in refineries. Natural soda-ash is produced only in dense form. Natural ash is also found in Africa and Australia.

All soda-ash produced in the United States is now obtained naturally (the last synthetic production plant was closed by 1986) while in Europe the entire production is of synthetic material. By reason of its lower salt content, natural soda-ash from the United States is particularly suitable for the manufacture of glass, and some glass producers who purchase mainly synthetic ash may seek to mix it with American natural ash in order to achieve the required concentration.

### 2. The producers

- (6) The six Community producers of synthetic soda-ash are:
  - Solvay,
  - ICI,

- Rhone-Poulenc,
- AKZO,
- Matthes & Weber (M & W),
- Chemische Fabrik Kalk (CFK).

Solvay is the largest single producer of synthetic soda-ash both worldwide and in the Community: it operates plants in Austria, Belgium, France, Germany, Italy, Spain and Portugal, and with some 60 % of the west European market is the undisputed market leader.

Solvay has an established 'Direction national' ('DN') for each of Austria, Belgium, Luxembourg, France, Germany, Italy, the Netherlands, Portugal, Spain and Switzerland to handle its commercial activities, with the headquarters in Brussels exercising a supervisory and coordinating role.

ICI Soda Ash Products has since 1987 been operated as a separate business within ICI's Chemicals and Polymers Division. Formerly it was part of ICI's Mond Division.

ICI is the second largest Community producer of soda-ash with two manufacturing sites in Northwich, Cheshire, but it confines its sales in the Community almost exclusively to the United Kingdom and Ireland and holds over 90 % of the UK market.

The present decision is not concerned with Rhone-Poulenc (France), AKZO (Netherlands), Chemische Fabrik Kalk or Matthes & Weber (Germany).

### 3. The market worldwide

- (7) Worldwide demand for soda-ash during the 1980s has been growing at around 1 % per annum, although there are substantial regional divergences. In the developed countries demand was static from 1980 until 1987, since which date there has been a considerable upturn in the market. Over half the soda-ash produced worldwide is consumed by the glass industry.

World soda-ash capacity (natural and synthetic) is currently around 36 million tonnes (nominal) per annum, of which the Community accounts for some 7,2 million tonnes, with Solvay capacity of some 4,3 million tonnes and ICI 1 million tonnes. (Practical or effective capacity is probably some 85-90 % of 'nameplate' capacity.) Soda-ash consumption in the Community is currently around 5,5 million tonnes annually, worth some ECU 900 million.

- (8) The six United States natural ash producers have total nominal capacity of 9,5 million tonnes per year and a domestic market demand in 1989 of some 6,5 million.

Natural ash production in the United States in 1989 was almost 9 million tonnes. The United States producers supply the whole of their home market and export the balance of production. Costs of production of natural ash are very much lower than for the synthetic product, but the mines are located far from their principal markets and distribution costs are correspondingly high.

The United States producers of dense ash are viewed by the European manufacturers as the major competitive threat in their home markets. At current exchange rates it is possible for these producers to sell in Europe at prices substantially below the local market price levels without dumping.

- (9) The east European producers account for some 30 % of world soda-ash capacity producing around 9 million tonnes annually. The Soviet Union consumes over half the production and is a net importer. Almost all of the excess production exported by the east European countries is in the form of light ash. Despite the existence of anti-dumping duties, there are still substantial imports into the Community of light soda-ash from Comecon countries.

In recent years there has been a marked increase in demand and soda-ash has been fully sold worldwide. Plants are now running at maximum output. In the period 1990 to 1992 Chinese manufacture is expected to increase by some 500 Kt per annum and production in Botswana (for South Africa) will produce another 300 Kt, developments likely to result in the displacement of imports from other production areas.

#### 4. The Community

- (10) Solvay is the market leader with almost 60 % of the total Community market and sales in all Member States except for the United Kingdom and Ireland.

After three years of stagnant demand in the mid-1980s, sales of soda-ash in western Europe began to increase substantially in 1987. In 1988 and 1989 producers worked at full capacity.

- (11) The west European market for soda-ash is still characterized by separation along national lines. The producers tend to concentrate their sales on those Member States where they possess production facilities, although since about 1981 or 1982 the smaller producers — CFK, M & W and AKZO — have increased their sales outside their 'home' markets.

There is no competition between Solvay and ICI, each limiting its Community sales to its traditional 'spheres

of influence' in continental western Europe and the British Isles respectively. Both ICI and Solvay have substantial export business to non-European overseas markets which are supplied from the EEC. A large part of ICI's exports in fact consist of material supplied to it by Solvay for this purpose.

In the Member States where Solvay is the sole locally established producer (Italy, Portugal and Spain) it has a virtually complete monopoly.

In Belgium Solvay's market share is in excess of 80 %, in France [ $> 50\%$ ] and in Germany [ $> 50\%$ ]. ICI has over 90 % of the UK market, the only alternative sources of supply being the United States and Poland.

- (12) On the demand side, the main customers in the Community are the glass manufacturers. Some 65-70 % of the output of the west European manufacturers is used in the manufacture of flat and hollow (container) glass. Soda-ash is one of the major cost components in glass production accounting for some 60 % of raw material batch costs. Most glass producers operate continuous process plants and require an assured supply of ash. In most cases they have a relatively long-term contract with one major supplier for the larger part of their requirements, with another supplier as a secondary source. The glass industry has in recent years been the subject of a Europe-wide consolidation with large manufacturers operating on a pan-European basis and manufacturing in several Member States. The chemical industry takes some 20 % of soda-ash consumption and metallurgical applications around 5 %.

#### 5. United States natural ash

- (13) The United States market has since the development of natural ash mining in the 1960s shown a substantial excess of capacity over domestic demand and a surplus of some 2,5 million tonnes is now available annually for export.

Given the over-supply and the presence of a number of producers with similar costs, the US domestic market has been marked by strong price competition. The product has in recent years been sold in the US at a substantial discount off 'list' price (\$ 93/short ton fob Wyoming) the net ex-works price at the end of 1989 being around \$ 73/short ton, to which must be added transport costs by rail to the East Coast industrial centres. List prices were raised by most producers to \$ 98/short ton effective on 1 July 1990 and the effective price went up to around \$ 85.

- (14) The pressure to export led to the United States producers attempting to penetrate the European and

other markets. Natural soda-ash began to appear in the Community in the late 1970s, principally in the United Kingdom. In 1982 United States imports into the Community amounted to some 100 000 tonnes, almost 80 000 tonnes of this in the United Kingdom. The European industry successfully applied for anti-dumping protection against United States dense soda-ash imports in 1982. (Anti-dumping measures have also been in force against east European imports of light, but not dense, ash since October 1982.)

- (15) The most recent measures granting anti-dumping protection against United States dense ash involved:

- (a) for the two producers then in the market, Allied (now General Chemical) and Texas Gulf, minimum price undertakings of £ 112,26/tonne ex store (Commission Regulation (EEC) No 2253/84 <sup>(1)</sup>);
- (b) for those producers not in the market, Tenneco, KMG, FMC and Stauffer, a definitive anti-dumping duty of ECU 67,49/tonne (Council Regulation (EEC) No 3337/84 <sup>(2)</sup>).

The price undertakings as negotiated provided for conversion into other currencies at the exchange rates then prevailing, and with the changes in parities since 1984 the undertaking price for Germany, France and other markets was substantially above the market price so no sales were commercially feasible under the undertaking outside the United Kingdom.

- (16) Texas Gulf suffered a loss in volume following the introduction of anti-dumping measures and withdrew from the United Kingdom market in 1985 so that, of the United States producers, only General Chemical is still supplying in the United Kingdom, although at a rate of only around 30 000 tonnes per year.

[... ] <sup>(3)</sup>. Texas Gulf has also sold some tonnage in Belgium. In both cases the imports have been made free of anti-dumping duties under special rules relating to 'inward-processing'.

- (17) A number of large Community customers in the glass sector have indicated their intention to take a substantial part of their business away from the Community producers and to buy from the United States. So far however a total of only about 40 000 tonnes has been supplied in continental western

Europe (as opposed to the United Kingdom and Ireland) by the United States producers, almost all of it under the inward-processing rules.

The anti-dumping measures provided for by Council Regulation (EEC) No 3337/84 expired in November 1989. A review of the measures had been requested by certain United States producers and by representatives of the Community glassmaking industry in 1988. On 7 September 1990 the review was terminated without protective measures being imposed (Commission Decision 90/507/EEC <sup>(4)</sup>).

- (18) In 1982, some of the United States producers formed an 'Export Association' under the 'Webb-Pommerene' Act of 1918 with the approval of the United States Department of Commerce: initially its activities were restricted to Japan and only three producers took part. In December 1983 all six natural ash producers joined to form the American Natural Soda Ash Corporation ('Ansac').

The function of Ansac is to act as a joint sales agency for the marketing and distribution of United States soda-ash exports outside the Americas. Its sales are around \$ 250 million annually. With the objective of extending its activities to the west European market (to replace sales by individual producers), Ansac notified its arrangements to the Commission with a request for negative clearance or exemption under Article 85 (3).

The application of Ansac is the subject of Commission Decision 91/301/EEC <sup>(5)</sup>, under which an exemption was refused.

### C. The market division arrangement between Solvay and ICI

#### 1. Separation of markets

- (19) Solvay and ICI, the two largest producers in western Europe and traditionally regarded as the industry leaders, do not sell in each others' 'home markets' and have never done so.

Solvay currently operates nine soda-ash plants, all located in western Europe. In the Community it has manufacturing facilities in Belgium, France, Germany, Italy, Portugal and Spain. In the last three markets it has a virtual monopoly. In the Community as a whole Solvay has a market share of 60%. If the United Kingdom and Ireland are excluded, as Solvay

<sup>(1)</sup> OJ No L 206, 2. 8. 1984, p. 15.

<sup>(2)</sup> OJ No L 311, 29. 11. 1984, p. 26.

<sup>(3)</sup> In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

<sup>(4)</sup> OJ No L 283, 16. 10. 1990, p. 38.

<sup>(5)</sup> See page 54 of this Official Journal.

does not sell there, Solvay's share of the market rises to 70%.

- (20) ICI is Europe's second largest soda-ash producer with two production units located near Northwich in Cheshire. (A third unit was closed in 1985.) Until the appearance of eastern European material in the United Kingdom in 1978, ICI had the market entirely to itself. In 1988 ICI had some [ $>90\%$ ] of the soda-ash market in the United Kingdom.

ICI also operates synthetic plants in Pakistan and (until 1990) in Australia and owns a 300 000 tpa natural soda-ash plant at Lake Magadi in Kenya. Material is not imported from these sources to Europe.

Up to about 1980, ICI's list price in the United Kingdom was lower than in adjacent markets. Since that date however United Kingdom prices have been considerably higher than those in continental western Europe, sometimes involving a premium of up to 20% over neighbouring markets.

- (21) In spite of these price differences, there have been no significant movements of soda-ash in either direction between the United Kingdom and the Member States in continental western Europe, the only exception being tonnages shipped by Solvay as 'co-producer' deliveries to ICI. No material has been sold by Solvay (or indeed any other Community producer) to customers in the United Kingdom, although price calculations found at the producers themselves show that even after the relatively high cost of transport from locations in continental western Europe the final delivered price to major customers (particularly in the south-east and east of England) would have been comparable to or even lower over a considerable period than ICI's price.

The only markets in continental western Europe in which ICI has ever supplied soda-ash in any appreciable quantity are the Scandinavian countries in which there is no domestic producer. It is significant that despite the transport costs involved in importing all the soda-ash consumed, price levels are considerably lower in Scandinavia than in those markets where there is an established soda-ash manufacturer.

## 2. *The Alkali Cartel*

- (22) Solvay and ICI have enjoyed close commercial links in the field of soda-ash and other chlorine-related products which go back to the 1870s when Brunner, Mond and Co., one of ICI's original constituent companies, became the first licensee of Solvay's ammonia-soda process and developed the manufacturing facilities in Cheshire which now constitute ICI Soda Ash Products.

The relationship between Solvay and Brunner, Mond included agreement upon their respective spheres of influence. The original market division was effected by means of the so-called 'Alkali Cartel', an arrangement in respect of which the producers have not provided any information. It is not known exactly what commercial arrangements were made when the Solvay process was first licensed to Brunner, Mond. It appears however that new international market-sharing arrangements in the alkali field (including soda-ash and caustic soda) were made on a worldwide basis between ICI and Solvay in 1928 (soon after ICI was formed from Brunner, Mond and three other companies) and in 1935 and in 1938 between ICI, Solvay and I.G. Farben. Other cartel agreements were made in 1933 between ICI and Alkasso (the United States Alkali Export Association) and in 1936 between ICI, Solvay and Alkasso. These arrangements involved the allocation of exclusive markets to one or other party, the assignment of quotas in some other markets and the fixing of prices on a worldwide scale. The domestic market of each of the cartel members was considered vested in the home producer. (See: *United States v. United States Alkali Export Association and Others*, 86 F Supp. 559; 1948-49 Trade Cases No 62 474).

## 3. *'Page 1000'*

- (23) In a new ICI/Solvay agreement made in 1945, the terms of which were set out in a document discovered at ICI and headed 'Page 1000', Solvay and ICI placed on the record their belief that 'the pre-war cooperation between them (which had gone on for nearly 70 years) in the technical and commercial development of the alkali business has been of benefit to both of them ...'

They stipulated that as in the past each would continue to pursue a commercial policy designed to encourage a steadily increasing overall consumption of alkalis:

'Each party intends to increase the volume of its sales by this means and not to increase them simply at the expense of the other party.'

'Page 1000' recorded that Solvay's manufacturing and selling organization was almost wholly within the continent of Europe while that of ICI was mainly within the British Commonwealth and other countries of Asia, Africa and South America.

The agreement substantially repeats and incorporates a statement of each of the two parties of their commercial policy towards each other in the alkali sector.

(24) ICI's declaration of its policy reads as follows:

'Acknowledging these common fundamental policies, and this geographical division of the respective organizations, ICI proposes, until this declaration of policy is rescinded, to conduct its commercial policy on the following broad lines:

- (a) in those countries where local manufacture of alkali is already well developed, and where imports consequently provide but a small proportion of the demand, ICI will (as between ICI and Solvay) regard the responsibility for the development of the business as resting entirely with the organization already established in that country;
- (b) in countries where local manufacture of alkali is not well developed and which import most of their requirements, ICI will (as between ICI and Solvay) regard the organization already established in that country as having the major responsibility for the development of the business, but will, in cases where ICI is the organization already established there, favourably consider any application by Solvay to participate in the import business and/or in the development of local manufacture;
- (c) paragraph (b) will be operated in such a way as to promote the consumption of alkali to the greatest possible extent, by developing local manufacture where it is demonstrably sound and economic as rapidly as circumstances permit and by arranging imports from those countries which can most suitably supply;
- (d) in the interpretation of paragraphs (a), (b) and (c), ICI will pay due regard to the prior commitments of Solvay to organizations other than ICI.

ICI understands that Solvay will conduct their policy on corresponding lines.'

Solvay's declaration of policy is in the same terms (*mutatis mutandis*) as that of ICI.

(25) In the 1949 version of their statement of commercial policy each party declared that the 'Page 1000' arrangements would not apply to their activities in the United States affecting the domestic or foreign trade of the United States.

With this exception, no doubt the result of the judgment of the United States District Court in the Alkasso case, the parties had agreed the broad lines of a policy of complete cooperation aimed at avoiding competition between them in any part of the world.

(26) On the occasion of the accession of the United Kingdom to the Community Solvay and ICI formally terminated the 'Page 1000' agreement with effect from 31 December 1972. According to the parties, a review of their contractual arrangements had shown that the agreement — which they say had already been considered out of date in 1962 — had never been formally cancelled. A letter of 12 October 1972 from Solvay to ICI is in those terms. An ICI board meeting of 26 October 1972 resolved that the 1949 minute confirming 'Page 1000' be cancelled. There is however some conflict between this minute, which repeats the statement contained in the Solvay letter that the arrangement had for a long time been considered 'outdated', and a later ICI board minute of 26 July 1973 which states that letters of termination had been sent to Solvay 'after both companies' legal advisers had advised that the agreements contravened Article 85 of the Treaty of Rome and, *if continued* <sup>(1)</sup>, would have to be notified to the EEC Commission'.

#### 4. *The continued market separation in soda-ash between Solvay and ICI*

(27) The alleged desuetude of the 'Page 1000' arrangement did not however manifest itself in any significant change in the commercial policy of Solvay or ICI in the soda-ash sector, either in 1962 or at any later stage. Neither ever competed with the other in their respective home markets in the Community. Similarly in overseas export markets each continued to respect the other's sphere of influence. Indeed since 1984 Solvay has provided substantial tonnages to ICI by means of co-producer deliveries to enable it to maintain its position in South Africa, traditionally ICI's major deep-sea market and one in which Solvay does not itself market the product. (See recitals 36-38, *post*). ICI has also kept Solvay informed of its sales policy and intentions in Sweden, the one market of any importance where both producers are present. To all intents and purposes the respective commercial policies of the two producers in soda-ash have been maintained exactly as they were set out in 'Page 1000'.

The rigid market division in soda-ash may be contrasted with that now pertaining in caustic soda which was also the subject of 'Page 1000'. There are now a large number of caustic-soda producers in the Community and despite the handling risks it is freely transported across national borders. ICI now produces caustic soda in Germany as well as in the United Kingdom and operates stock tanks in France and the Netherlands from which it supplies customers throughout the Community. Solvay for its part operates a stock tank on Merseyside from which it supplies customers in the United Kingdom.

(1) Emphasis added.

### 5. *The home market principle*

- (28) Over many years all the soda-ash producers in Europe accepted and acted upon the 'home market' principle as the basis on which their commercial operations were determined.

Under this principle each producer limited its sales to (a) the country or countries in which it had established production facilities, (b) export markets in which there was no domestic producer. The other producers reciprocated by not selling into the 'home market' of that producer. In the event of incursions by an outsider into what a producer considered its home market, it was entitled and expected to 'retaliate' by selling an equivalent tonnage on the intruder's home market.

- (29) The documents obtained at several producers show that the protection of home markets by this means was for many years the subject of a general consensus in the soda-ash industry. Indeed the concept of 'retaliation' as a means of defending the home market was expressly provided for in a market-sharing agreement made between Solvay and Nederlandse Soda Industrie (now AKZO) in 1956 (which is not the subject of any proceedings under Article 85). The 'home market' rule was strictly observed by all producers until the 1970s when declining demand and the appearance in continental western Europe of United States natural ash and east European material provided some element of competition. AKZO also began selling in the German market in the late 1970s since the Netherlands was too small a market to fill its available production capacity. Solvay had apparently indicated to AKZO its acceptance of this development without first obtaining the agreement of the smaller German producers. One of those affected therefore indicated to AKZO that it would begin to sell in the Netherlands and continue to do so as long as AKZO sold in Germany. In general, however, deliveries to customers across national borders (as opposed to co-producer sales) are still apparently considered by producers as an exception.

### 6. *The continuing Solvay-ICI relationship*

- (30) Solvay and ICI have continued to maintain a close commercial relationship in the soda-ash sector. As the 'traditional industry leaders' in Europe they share an interest in maintaining the stability of the market. The two producers have maintained frequent contacts and meet each other to discuss matters of mutual concern in the soda-ash market. Up to the mid-1970s they exchanged detailed information on their production costs. The precise regularity and frequency of the

meetings is not known but since 1985 they appear to have been held about every two months.

- (31) During the administrative proceedings the two producers claimed that no discussions took place on any matters of significant commercial sensitivity. ICI says that the matters covered in these meetings related only to subjects for legitimate discussion, namely:

- (a) purchase for resale arrangements in the United Kingdom and South Africa;
- (b) anti-dumping measures by the European producers against United States and east European imports;
- (c) general market trends in demand;
- (d) exchange of information as to the extent of substitution of caustic soda and 'cullet' (broken glass) for soda-ash in certain industries.

- (32) According to ICI, the meetings with Solvay were fully minuted and no 'secret' discussions occurred. The detailed notes of several of these meetings in fact show that the two producers did indeed discuss subjects which were crucially important to their global strategy in the soda-ash sector. The two producers clearly consider themselves to have a shared interest in price stability. Solvay informed ICI of general price trends and planned price increases in continental western Europe, matters which ICI itself (in another context) stated during the oral hearing to be of vital importance to its commercial policy in the United Kingdom. They were also anxious to avoid any friction between their respective soda-ash operations and informed each other on possible areas where their interests might conflict. Thus ICI informed Solvay of its intention to re-enter the Scandinavian market in the second half of 1986. There was also some complaint from ICI (passed on from its Kenyan operation at Lake Magadi) about Solvay having caused it annoyance by increasing sales in Indonesia. On another occasion Solvay was 'upset' because ICI had bought some PFR tonnage from AKZO. It is also significant that ICI considered it necessary to explain to Solvay in July 1986 the underlying principles of its formation of Soda Ash Products as a separate business within the ICI structure.

- (33) ICI's declared business strategy for soda-ash is to maintain its position as the dominant and controlling supplier of soda-ash in the United Kingdom.

The 'long-standing' relationship with Solvay is clearly of vital importance in this connection. It is made clear in ICI documents that the basis of the continuing relationship is a mutual abstention from competition. ICI was particularly anxious that this relationship

should not be put at risk. In a document relating to a possible modification of ICI's soda-ash strategy (a proposal which might have altered the *status quo* and was not in fact adopted) the question is asked 'How will Solvay see us? Will they continue to see no United Kingdom competition?' The policy of Solvay itself in relation to the United Kingdom is described as 'benign'.

- (34) In other documents dating from 1988 ICI perceives its present relationship with Solvay in terms of historical values dating from the 'Brunner, Mond' days:

'Our relationship with Solvay is crucial as to volume, price and "limiting the intrusion of others into our market". Relationship/behaviour is largely determined by historical values associated with the Brunner, Mond era.'

Another note found at ICI states that Solvay 'view SAP <sup>(1)</sup> as the inheritors of the Brunner, Mond position'.

- (35) Other ICI documents specifically make the point that ICI should consult Solvay before taking commercial decisions which might alter the balance between their respective soda-ash operations. One note mentions the need to 'test' Solvay's reaction to a possible structural change in the business 'through the appropriate channels', a phrase which suggests that the opportunities for dialogue on such matters already existed. Another note on the same subject foresees that Solvay might 'react aggressively' if the change were implemented, but goes on: 'Talk with Solvay. Treat them kindly. Tell them in advance.'

There was also a reference to the need in the context of the 'long-standing relationship' with Solvay to pay a 'courtesy call' on Solvay before taking the step under discussion. During the oral hearing, the Business Manager of ICI Soda Ash Products, while asserting that he had never seen 'Page 1000', admitted that he knew of its existence. He also stated that the 'traditions which existed in the past with Brunner, Mond' were something which ICI had to consider and that Solvay as the major European producer would have 'concerns' if the structure of ICI's soda-ash business were to be changed, hence the need to inform Solvay in advance.

#### 7. Solvay's 'PFR' sales to ICI

- (36) An important aspect of the close ICI-Solvay relationship was ICI's practice of purchasing

substantial tonnages of soda-ash from Solvay in order to meet medium- and long-term commitments in its traditional markets.

These arrangements — referred to as 'purchase for resale' or 'PFR' — followed ICI's closure of its Womersley works in 1984. The reduction in capacity meant that for several years ICI was unable to meet the whole domestic demand in the United Kingdom and Ireland, let alone continue to supply its major export market in South Africa. One of the basic tenets of ICI's commercial policy being the maintenance of its control over the United Kingdom market, it was prepared neither to see any other producer take up the shortfall on its home market nor to allow customers to begin importing directly themselves.

- (37) For several years ICI purchased substantial tonnages from Solvay for resale to United Kingdom customers (who were not apparently aware of the origin of the material):

(in 1 000 tonnes)

1985	1986	1987	1988	1989
40,2	29,4	5,8	3,0	—

Solvay is also the principal source of soda-ash sold in South Africa by ICI, which does not itself procure any of the material it sells in that market.

(in 1 000 tonnes)

1983	1984	1985	1986	1987	1988	1989 (six months)
16,0	53,4	65,8	99,5	92,6	78,9	26,0

- (38) The vital significance of the PFR arrangements in terms of maintaining the rigid division between Solvay's and ICI's respective 'spheres of influence' is apparent from an ICI memorandum of 17 September 1982. Capacity reduction to a point where ICI could not cover United Kingdom demand was seen as bound to lead to a change in the perceptions both of customers and other producers. ICI's concern was to maintain its control over the United Kingdom market and prevent any perception that its 'sovereignty' had been weakened by the planned capacity reduction. Under the heading 'Market Control' the memorandum continues:

'Opportunities could be developed to "manage" capacity reduction in such a way as to maintain market control. For example, a purchase for resale (PFR) deal might be struck with a co-producer to meet the deficit or export markets such as South Africa might be traded off against the expectation of orderly behaviour in the United Kingdom.'

(1) 'SAP' = ICI Soda Ash Products.



Judged in the light of the above document, the importance of the PFR arrangements with Solvay becomes clear. The '*status quo*' (in particular ICI's dominance of, and Solvay's abstention from, its United Kingdom 'home market') is maintained while in return Solvay under the 'trade off' has the commercial benefit of substantial PFR sales to ICI on a long-term basis.

- (39) For its part Solvay appears, following Commission Decision 85/74/EEC <sup>(1)</sup> 'Peroxides', to have been 'acutely sensitive to the perceptions of the market-place to any business relationship between chemical producers', including PFR arrangements (ICI note of 15 February 1985). According to this note, Solvay was in general reluctant to supply on a direct basis to ICI either to markets where both producers were present or where the customer in question was a division of a pan-European group. Solvay was however prepared to make a number of 'compromises' or 'exceptions' particularly as regards markets such as South Africa and Ireland where it had no sales structure itself.

Although ICI seems originally to have presented these arrangements to Solvay as intended simply to overcome short-term production problems, it must soon have been apparent to Solvay that their purpose was to support ICI's long-term position in particular countries and thereby preserve the existing separation of markets between the two groups.

#### 8. *The defence of Solvay and ICI*

- (40) Neither Solvay nor ICI dispute (a) that in the Community there is little or no competition between them, (b) that in each case this phenomenon is the result of a considered and conscious decision by management.

They both assert however that their respective decisions not to compete were reached independently by each undertaking on purely commercial considerations and without any element of collusion or concertation.

- (41) According to ICI and Solvay, the cancellation of the 'Page 1000' agreement in 1972 was made in complete good faith and indeed was no more than a formal recognition that the arrangements had been a dead letter since 1962. There was therefore no question of their continuing to respect in practice the spirit of the old market allocation agreements dating back to the 'Brunner, Mond' era. ICI claims that the competition in the caustic-soda sector between Solvay and ICI shows that 'Page 1000' has no longer any application whatever.

- (42) The reasons for the continuing separation of markets as between Solvay and ICI in soda-ash are said to be purely commercial considerations. It makes sense (it is said) for each producer to concentrate its sales on its natural 'home market' within which it has a natural competitive advantage. Transport costs for soda-ash are relatively high in relation to the final selling price, and this factor, combined with customer preference for a local source with long-term security of supply, has led to a natural separation of markets along geographical lines. In the case of the United Kingdom in particular the requirement for a sea-crossing accounts for the insulation of the market in both directions.

Since 1980 the price of soda-ash in the United Kingdom has been higher than in continental western Europe. It would be absurd (says ICI) for it to offer the product to customers in continental western Europe markets where not only is the market price lower but it would have to undercut the existing supplier. The transport costs from the United Kingdom would be prohibitive: in support of this proposition ICI has provided freight tables in which the cost of road transport to northern France is estimated at some £ 40/tonne, almost 40% of the net selling price. (During the oral hearing however ICI admitted that this cost would be halved if a depot were established in France and supplied by coaster.)

- (43) In addition ICI and Solvay point to the risk of 'retaliation' in the event of a competitive incursion by one into the market of the other. If one producer displaced the other at a particular customer, the affected supplier would have no alternative but to seek to place the lost tonnage elsewhere, the most likely market being the aggressor's own home market; ultimately each would end up selling the same tonnage but both would incur greater costs and generate lower profits. The reason the two producers do not aggressively market in each other's home markets is thus said to be an awareness that such an exercise would generate a price war from which neither would gain.

According to ICI and Solvay, theirs is purely an 'arm's-length' relationship. While ICI insists that their meetings were concerned only with legitimate matters, Solvay does however acknowledge that on occasions executives on both sides may have attempted to go further and obtain information of a more confidential nature but this, it is said, does not point to concertation.

#### 9. *The economic survey produced by ICI*

- (44) An economics expert commissioned by ICI to produce a report for the purposes of the proceedings concluded

<sup>(1)</sup> OJ No L 35, 7. 2. 1985, p. 1.

that, given the structure and conditions of the soda-ash industry, the producers could be expected to concentrate on their home markets and refrain from competition with one another without any collusion. This market equilibrium is explained by reference to the 'Cournot' model which is characterized by the expectation of undertakings in an industry that other undertakings will maintain output whatever change the individual makes <sup>(1)</sup>. ICI also sought to explain oligopolistic behaviour in the industry in terms of the 'theory of games' <sup>(2)</sup>. According to ICI the rigidity of the market is the result of a 'non-cooperative game' in which each producer recognizes the risk of retaliation and to avoid the risk becoming a reality tries to maintain a stable market position. The 'alternative solution' in theory that margins could be improved still further by the undertakings acting together as a monopolist, is dismissed by ICI on the grounds that (a) it would not work in an industry with falling sales, and (b) the potential rewards were not sufficient to overcome the difficulties involved in cooperation. A theoretical model is however only as useful as the information it is used to analyse. The economics expert admitted during the oral hearing that she had not even seen the documentary evidence annexed to the statement of objections. Given the express terms of 'Page 1000', it is wholly inapt to explain the historical separation of markets in terms of a 'non-collaborative game'. Similarly the documentary evidence of consultation between ICI and Solvay so as to reduce uncertainty as to their responses to the other's behaviour, which is inconsistent with the theory of 'non-collaboration', was also ignored. The conclusion of the report that the structure of the industry and the conduct of the producers was referable to a non-collaborative strategy was thus reached without consideration of the relevant evidence.

#### 10. Factual assessment

- (45) On the basis of the above factual and economic evidence, the Commission does not accept that the strict market division between Solvay and ICI which is a characteristic of the soda-ash market in the Community results from the operation of natural market forces or the independent commercial judgment of the two producers.

It considers on the contrary that the market separation is the subject of a continued understanding between

the two producers and based on the mutual recognition of each other's exclusive sphere of influence or zone of operations.

- (46) The argument that their policy of mutual abstention in the market is the result of 'individual business judgment' might be more persuasive had there never been any agreement between them. This is not a case where two large competitors had fought each other to a standstill and had entirely without any contact decided that intensive rivalry brought no benefit to either one.

It has never been satisfactorily explained why, if the division of markets is entirely the result of natural competitive and geographic conditions, the two producers should ever have thought it necessary to conclude agreements such as the 'Alkali Cartel' and 'Page 1000'.

- (47) As far as soda-ash is concerned the statements by Solvay and ICI in 'Page 1000' of their commercial policy *vis-à-vis* the other in 1945 remained an accurate description of their policy up to the date of the present proceedings. Neither competed on the 'home market' of the other and each did so in the expectation that the other would apply the same policy. ICI's characterization of the present relationship of non-competition in terms of the 'historical values of association from Brunner, Mond days' is clearly indicative of a long-standing and continuing understanding between the two producers. Solvay or ICI are unable to point to any alteration in their commercial policies in relation to soda-ash (as opposed to caustic soda) which might support the assertion that 'Page 1000' had become a 'dead letter' by 1962. The formal cancellation of the agreement 10 years later likewise did not result in any change.

Nor is this a case where the two producers concerned have no contact with each other. The frequent contacts, even if their immediate purpose was to discuss the 'purchase for resale' arrangements, were not conducive to an atmosphere of commercial rivalry. Indeed, contrary to ICI's assertions, the subjects discussed were not limited to 'technical' matters but included exchanges of information on global commercial strategy and on matters regarded as being of crucial importance to ICI's continuing control of the United Kingdom market. It is inconceivable that two undertakings would have conducted discussions of such a nature unless it were clearly understood between them that they were not potential competitors. It was also clearly envisaged that the two producers would contact and consult each other so as to remove any uncertainty as to their reactions to the other's conduct.

<sup>(1)</sup> See A. Cournot, *Researches into the Mathematical Principles of the Theory of Wealth* (1938).

<sup>(2)</sup> J. Von Neumann and O. Morgenstern, *Theory of Games and Economic Behaviour* (1944).

(48) The long-term use by the two largest Community producers of product for resale arrangements is also indicative of a shared interest and intention to maintain the *status quo*, in particular the geographic separation of their respective spheres of influence. ICI's own documentation emphasizes that its relationship with Solvay is 'crucial to volume, price and limiting the intrusion of others into our market'. The ICI-Solvay arrangements relating to South Africa are as important in this connection as the direct deliveries by Solvay to the United Kingdom. In the light of the reference to a 'trade-off' in ICI's own documentation (see recital 38) it cannot be seriously disputed that the *quid pro quo* was Solvay's continued abstention from the United Kingdom market.

(49) The fact that ICI for some time apparently attempted to conceal from Solvay the full extent of its production difficulties in the United Kingdom does not, as ICI argues, disprove the existence of any collusive arrangement between them. The understanding between them as to their respective spheres of influence in the United Kingdom and continental western Europe respectively was not the result of any altruism on Solvay's part but depended upon a complex interplay of interests. In the event of any perceived long-term inability on the part of ICI to balance production with United Kingdom demand, Solvay could hardly be expected to stand by while other west European producers took advantage. The whole object of the arrangement was the maintenance of the *status quo* in the interests of the two producers. Given also that any collusive agreement would be unenforceable and would only be respected so long as it was in both parties' interests, ICI may well have been prudent not to trust Solvay entirely on this occasion.

Similarly, the possibility of 'retaliation' which Solvay and ICI claim as the reason for their respective abstention from each other's 'home market' in no way excludes the existence of any understanding between them. On the contrary, it was generally accepted by the industry that 'retaliation' was the normal sanction for any breach of the 'home market' principle: the threat of retaliation thus served to encourage continued cooperation.

In summary, the documentation obtained from the producers shows that far from considering themselves as business rivals Solvay and ICI saw each other as close partners.

(50) The Commission does not accept the argument that high transport costs and customer preference for a local supplier are the reasons for the complete absence of cross-Channel trade.

Before 1980 the United Kingdom price was lower than price levels in continental western Europe but ICI did not sell the product to other Member States. Even if United Kingdom prices increased from that time ICI

would normally have had every incentive to develop sales in western Europe in order to maintain full loading of its plant. In any event ICI overstated the cost of transport from the United Kingdom to neighbouring Member States by producing estimated figures for transport by road tanker. Any realistic marketing programme in continental western Europe would have entailed establishing a depot and supplying it by sea, which would probably have halved the delivery costs quoted by ICI.

(51) As regards the possibility of trade in the opposite direction, the major container glass customers in the United Kingdom are relatively favourably located in terms of access from continental western Europe. The pricing comparisons obtained at the producers themselves show that it would have been perfectly feasible for Solvay to have delivered to customers particularly in the east and south-east of England.

The absence of trade in soda-ash is in direct contrast with the present competitive environment in caustic soda, a product which is comparable in price but more expensive and more hazardous to ship.

Nor is the argument about 'customer preference' for a local supplier persuasive. It is difficult to accept that glass manufacturers in the United Kingdom 'preferred' to pay 15 to 20 % more for their major raw material than their competitors in continental western Europe. There is also abundant evidence that ICI was concerned that its container glass customers in the United Kingdom might be driven to seek sources of cheap ash in continental western Europe.

It is significant that since the institution of the proceedings in the present case, Solvay has started quoting to customers for delivering in the United Kingdom from Germany at prices which are competitive with those of ICI.

## PART II

### LEGAL ASSESSMENT

#### A. Article 85 of the EEC Treaty

##### 1. Article 85 (1)

(52) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction

or distortion of competition, and in particular those which directly or indirectly fix purchase prices or any other trading conditions and share markets or sources of supply.

## 2. Agreement/concerted practice

- (53) The main issue for present purposes is whether the rigid market separation and absence of competition between Solvay and ICI is the result of express or tacit collusion between them or whether it is the result of their independent business judgment.

The market separation has its origins in an express agreement (the 'Alkali cartel', 'Page 1000', etc.). Although that agreement has formally been terminated, the factual separation envisaged therein has continued up to the present: Solvay and ICI do not compete with each other in any Community market.

- (54) The Court of Justice has held (Case 51/75: *EMI Records v. CBS United Kingdom* <sup>(1)</sup>) that:

'For Article 85 to apply to a case . . . of agreements which are no longer in force it is sufficient that such agreements continue to produce their effects after they have formally ceased to be in force.' (Paragraph 30)

However as the Court went on to observe at Paragraph 31:

'An agreement is only to be regarded as continuing to produce its effects if from the behaviour of the parties concerned there may be inferred the existence of elements of concerted practice and of coordination peculiar to the agreement and producing the same result as that envisaged by the agreement.'

- (55) The Commission fully accepts that there is no direct evidence of an express agreement between Solvay and ICI to continue to respect the 'Page 1000' cartel in practice.

However there is no need for an express agreement in order for Article 85 to apply. A tacit agreement would also fall under Community competition law. Given the express prohibition in Article 85 against concerted practices, it is however unnecessary in the present case

to determine whether there was any actual 'agreement' at all, whether express or tacit. The object of the Treaty in creating a separate concept of concerted practice is to forestall the possibility of undertakings evading the application of Article 85 (1) by colluding in an anti-competitive manner falling short of a definite agreement by (for example) informing each other in advance of the attitude each intends to adopt, so that each may regulate its commercial conduct in the knowledge that its competitors will behave in the same way: Judgment of the Court of Justice in Case 48/69 *Imperial Chemical Industries Ltd v. Commission* <sup>(2)</sup>.

- (56) In its later Judgment in relation to the European Sugar Cartel — Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others v. Commission* <sup>(3)</sup> — the Court of Justice in expanding upon the above definition of a concerted practice held that the criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept, inherent in the provisions of the Treaty relating to competition, that each economic operator must determine independently the commercial policy which he intends to adopt in the market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors but it does strictly preclude any direct or indirect contact between them the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

- (57) It is not disputed by either of the two major Community producers that they each follow a deliberate policy of non-competition by not marketing soda-ash in the territory of the other. Nor do they deny that for both of them the whole point of the policy is that it is dependent upon the other producer making the same decision. The only question is whether the deliberate — and reciprocated — policy of abstention is referable to unlawful concertation or is the result of the independent commercial judgment of the two producers.

In this connection it is not necessary, as ICI argues, that in order for an infringement to be found it has to be proved that but for the alleged collusion there would have been a substantial trade between the United Kingdom and the Member States where Solvay is established. What has to be demonstrated is that the two producers in fact substituted practical

<sup>(1)</sup> [1976] ECR 811.

<sup>(2)</sup> [1972] ECR 619.

<sup>(3)</sup> [1975] ECR 1663.

cooperation for the risks of competition which might otherwise develop. While any assessment of the volume of trade which might have occurred is speculative, what is shown is that such trade was commercially feasible in both directions.

(58) In the present case the Commission considers that the documentary evidence shows that:

- (a) the original separation of markets between Solvay and ICI was the result of a long-standing and express agreement between them, the latest known version of which was 'Page 1000';
- (b) the formal termination of the 'Page 1000' agreement in 1972 did not result in or reflect any alteration in practice of the strict market separation between Solvay and ICI;
- (c) both Solvay and ICI were well aware that the other was continuing to follow a deliberate commercial policy of reciprocal abstention from which each derived an anti-competitive benefit, i.e. dominance and control of their respective markets;
- (d) the policy of each producer of abstaining from the other's markets depended upon the other respecting the same policy;
- (e) Solvay and ICI continued to have a relationship of complete cooperation<sup>(1)</sup> indicative of partnership rather than of competition;
- (f) there were frequent contacts between the two producers designed to coordinate their global strategy in soda-ash and avoid any conflict between their respective interests;
- (g) the whole basis of this continued partnership was the shared understanding that the commercial policies dating from the 'Brunner, Mond' era, i.e. reciprocal recognition of exclusive spheres of operation, would be maintained.

(59) It is indeed extremely unlikely that, given the well-known legal risks, any written resolution would nowadays be made recording the details of such an

<sup>(1)</sup> For the purposes of the present case, the Commission does not consider the Solvay/ICI 'PFR' arrangements as constituting *per se* infringements of Article 85: rather they are indicative of (a) the close commercial relationship between the two producers in the soda-ash field, and (b) a shared concern to maintain the status quo, and are part and parcel of a wider concertation to eliminate competition between them: (e.g. *Suiker Unie v. Commission*, at recital 182; Joined Cases 29 and 30/83 *Cram and Rheinzink v. Commission* [1984] ECR 1679.

understanding. There are many forms and degrees of collusion and it does not require the making of a formal agreement. An infringement of Article 85 may well exist where the parties have not even spelled out an agreement in terms but each infers commitment from the other on the basis of conduct.

The definition of the Court of Justice of a concerted practice as set out in its judgment in *Suiker Unie* is thus entirely apt to cover the commercial behaviour of ICI and Solvay.

The Commission therefore finds that the continued division of national markets between Solvay and ICI results from and is referable at least to a concerted practice.

### 3. Restrictions of competition/effect on trade between Member States

- (60) Arrangements between producers which have the object or effect of protecting national markets are expressly prohibited by subparagraph (c) of Article 85 (1). Such protection is in fundamental conflict with one of the basic objectives of the Treaty, namely the creation of a common market. Given the size of the two undertakings concerned and their importance in the market for soda-ash, there can be no doubt that the arrangement had an appreciable effect upon trade between Member States.

## B. Remedies and sanctions

### 1. Article 3 of Regulation No 17

- (61) Where the Commission finds that there is an infringement of Article 85, it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.

The arrangements in the present case were conceived and implemented in secret and both undertakings have continued to deny the existence of any infringement of Article 85. As a result, it is uncertain whether or not they have definitively put an end to the collusion. It is therefore necessary, pursuant to Article 3 of Regulation No 17, to require ICI and Solvay to bring the infringement to an immediate end.

The parties must also be prohibited from any agreement or concerted practice having equivalent effect.

## 2. Article 15 (2) of Regulation No 17

- (62) Under Article 15 (2) of Regulation No 17, the Commission may by decision impose on undertakings fines of from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) or Article 86. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement.

## (a) Gravity

- (63) In the present case the Commission considers that the infringement was of considerable gravity. Over a long period of time the two major producers of soda-ash in the Community have knowingly concerted their commercial policies so as to avoid all competition between them in an important industrial product and a market worth some ECU 900 million annually. But for the discovery of the relevant evidence by the Commission, there is every likelihood that they would have continued their anti-competitive cooperation in some form for an indefinite period.
- (64) The division of markets on national lines by means of collusive arrangements constitutes an infringement which is contrary to the most fundamental objectives of the EEC Treaty, namely the creation of a single market between Member States.

The protection of home markets allows the producers involved to pursue a commercial policy in their own market which is insulated from competition from other Member States. The complete absence of imports to the United Kingdom from other Member States has undoubtedly contributed to the maintenance of ICI's dominant position (over 90% market share). Solvay was also protected from any competitive pressure from the second largest Community producer. The absence of competition between the two major Community producers to a large extent ensured that the market for soda-ash was partitioned along national boundaries. It must also have been an important factor in the maintenance of the substantial price differences which exist between the United Kingdom and the Member States in continental western Europe for this product.

- (65) The infringement was deliberate and both parties must have been well aware of the obvious incompatibility of their arrangements with Community law.

Both Solvay and ICI have been the subject on several previous occasions of substantial fines imposed by the Commission for collusion in the chemicals industry:

69/243/EEC Dyestuffs (ICI) <sup>(1)</sup>; 85/74/EEC Peroxides (Solvay); 86/398/EEC Polypropylene (Solvay, ICI) <sup>(2)</sup>; 89/190/EEC PVC (Solvay, ICI) <sup>(3)</sup>; 89/191/EEC LdPE (ICI) <sup>(4)</sup>.

- (66) Furthermore, the activities of both producers in the soda-ash sector itself were the subject of scrutiny by the Commission between 1980 and 1982. Although at that time the Commission was more particularly concerned with the producers' exclusive supply agreements with customers, those responsible for the soda-ash activities cannot have been ignorant of the need to comply with Community law.

## (b) Duration

- (67) The ICI-Solvay arrangement dates from before the establishment of the common market. It would have been legitimate for the Commission to assess any fine on the basis that it has constituted an infringement since at least the date on which Regulation No 17 came into effect, namely 6 February 1962: the fact that ICI has its head office outside the Community would not prevent the application of Article 85 if trade between Member States had been affected. For the purposes of the present case the Commission will however assess fines on the basis that it commenced from the date of United Kingdom accession to the Communities on 1 January 1973 and has continued at least up to the institution of the proceedings in the present case.
- (68) The Commission therefore considers that substantial fines should be imposed on both Solvay and ICI in respect of this infringement. Solvay's sales of soda-ash in the Community in 1988 came to ECU [...] million while ICI's were ECU [...] million. The Commission does not however consider it appropriate in the present case to distinguish between the two producers as regards the amount of the fine. Each producer derived a considerable benefit from the infringement. Both are large multinational concerns and while ICI's soda-ash sales are less than one-third those of Solvay's, its turnover for all products is three times greater than that of Solvay,

HAS ADOPTED THIS DECISION:

## Article 1

Solvay et Cie SA ('Solvay') and Imperial Chemical Industries plc ('ICI') infringe Article 85 of the EEC Treaty by

<sup>(1)</sup> OJ No L 195, 7. 8. 1969, p. 11.

<sup>(2)</sup> OJ No L 230, 18. 8. 1986, p. 1.

<sup>(3)</sup> OJ No L 74, 17. 3. 1989, p. 1.

<sup>(4)</sup> OJ No L 74, 17. 3. 1989, p. 21.

participating since 1 January 1973 until at least the institution of the present proceedings in a concerted practice by which they confined their soda-ash sales in the Community to their respective home markets, namely continental western Europe for Solvay and the United Kingdom and Ireland for ICI.

#### *Article 2*

Solvay and ICI shall forthwith bring the infringement to an end (if they have not done so already) and shall in the future refrain from any agreement or concerted practice which may have the same or the equivalent object or effect.

#### *Article 3*

The following fines are imposed upon the undertakings named herein in respect of the infringement found in Article 1:

- (a) Solvay et Cie, Brussels, a fine of ECU 7 million;
- (b) Imperial Chemical Industries plc, London, a fine of ECU 7 million.

#### *Article 4*

The fines imposed under Article 3 shall be paid within three months of the date of notification of this Decision to the following bank account:

No 310-0933000-43,  
Banque Bruxelles Lambert,  
Agence Européenne,  
Rond Point Schuman, 5,  
B-1040 Brussels.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 14 %.

Should payment be made in the national currency of the Member State in which the bank nominated for payment is situated, the exchange rate applicable shall be that prevailing on the day preceeding payment.

#### *Article 5*

This Decision is addressed to:

- Solvay et Cie SA, rue du Prince Albert 33, B-1050 Brussels;
- Imperial Chemical Industries plc, Millbank, UK-London SW1P 3JF.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 19 December 1990.

*For the Commission*

Leon BRITTAN

*Vice-President*